



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

MEMORANDUM

TO: THE COMMISSION  
STAFF DIRECTOR  
GENERAL COUNSEL  
FEC PRESS OFFICE  
FEC PUBLIC RECORDS

FROM: MARY W. DOVE *MWD*  
SECRETARY OF THE COMMISSION

DATE: July 23, 2003

SUBJECT: *Ex Parte* COMMUNICATION REGARDING  
REVISED DRAFT AO 2003-17

Transmitted herewith is a letter from Caroline A. Sadlowski, Assistant U.S. Attorney, District of New Jersey, to Vice Chairman Bradley A. Smith regarding the above subject matter.

Proposed Advisory Opinion 2003-17 is on the agenda for Thursday, July 24, 2003.

Attachment:

5 pages



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U.S. Department of Justice

United States Attorney  
District of New Jersey  
Civil Division

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970 Broad Street, Suite 700  
Newark, New Jersey 07102

general number: (973) 645-2700  
telephone: (973) 645-2873  
fax: (973) 297-2010  
e-mail: caroline.sadlowski@usdeej.gov

Via Fax and 1<sup>st</sup> Class

July 23, 2003

The Honorable Bradley A. Smith  
Vice Chairman  
Federal Election Commission  
999 E Street, N.W.  
Washington, D.C. 20463

Re: Draft Advisory Opinion 2003-17

Dear Mr. Vice Chairman:

This letter represents a comment on the Federal Election Commission's second Draft Advisory Opinion 2003-17 (the "Opinion"), issued on July 17, 2003. This Opinion was issued in response to a request by counsel for James Treffinger regarding whether Mr. Treffinger may use surplus campaign funds to pay for his legal defense against a twenty-Count criminal Indictment charging him with extortion, fraud and related offenses. We vigorously contend that expenses flowing directly from such criminal activity may never be classified as campaign-related, as reflected in the Commission's first Draft Advisory Opinion, issued on July 3, 2003. Nevertheless, although the second Opinion designates several Counts of the Indictment as campaign-related, it sustains the critical distinction between crimes which are campaign-related and crimes whose proceeds merely benefit a campaign. Therefore, if the Commission is unwilling to issue the first Draft Advisory Opinion, it should ultimately endorse the underlying reasoning of the second Draft Advisory Opinion, albeit while distinguishing further Counts as unrelated to the campaign. Furthermore, any use of campaign funds for Mr. Treffinger's legal defense should be deferred until after all contributors are refunded as required by 11 C.F.R. 102.9(e)(3) and until after sentencing, when the final amount of restitution is established and any fines are imposed and paid.

The first Draft Advisory Opinion provided a very straightforward and compelling analysis of the Counts of the Indictment. It determined that the extortion and fraud charged in the Indictment were not campaign-related, but were instead committed by Mr. Treffinger in his capacity as Essex County Executive. Rather than distinguishing among the various Counts, the first Opinion found that any violations of campaign law occurred primarily to obscure the underlying acts of extortion and fraud. Therefore, the first Opinion concluded that all the Counts of the Indictment were essentially unrelated to Mr. Treffinger's campaign and none of the surplus campaign funds were available to Mr. Treffinger to pay his legal fees in that action. Such a

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COUNSEL

decision would ensure that no funds tainted by association with criminal proceeds could be used to pay for Mr. Treffinger's defense. For these reasons, this Opinion represents the correct, and also most appropriate response to Mr. Treffinger's request.

In contrast, the second Opinion permits payment for legal defense of those Counts of the Indictment which charge violations of election law and denies payment with respect to Counts which charge extortion and other fraud. Although we strongly urge that the Commission not adopt the second Opinion, if it does, we request that the second Opinion preserve the essential distinction between legal expenses arising from campaign activities and legal expenses arising from non-campaign criminal activities. Specifically, the second Opinion declines to designate charges of fraud and extortion against Mr. Treffinger in his capacity as Essex County Executive as campaign expenses simply because Mr. Treffinger used proceeds of these crimes to fund his federal campaign. Therefore, the second Opinion does not trivialize Mr. Treffinger's extortion and fraud by deeming them "fund raising" violations, but instead recognizes that such crimes are an anathema to ordinary campaign activity and that their defense is a personal expense.

The Commission rightly recognizes that while this case is similar to prior cases, in which legal fees have been allowed to assist a candidate in defending against alleged civil violations, the rationale that supported campaign funding of those defenses is inapplicable to Mr. Treffinger. In prior opinions, the fact that a candidate had broad discretion in responding to the media or that a federal office holder was subject to extensive government oversight justified payment of legal fees. See Advisory Opinions 1997-12, 1998-1. In this case, however, Mr. Treffinger is no longer a candidate or an office holder. He has no public relations obligations and is subject to no special oversight. Therefore, none of the reasons employed by the Commission to justify payment of legal expenses in prior opinions apply to Mr. Treffinger.

Most importantly, the wrongdoing in this case is far more serious than in the previous cases. It does not involve a political adversary's civil charges regarding the removal of campaign signs, or even a House Ethics inquiry into a candidate's reports to that body. See Advisory Opinions 1995-23, 1997-12, 1998-1. Instead it consists of federal criminal charges that a local office holder abused his position of public trust. Such charges do not arise as a result of campaign or other political machinations and may only be brought by the government, not by a political adversary. While Mr. Treffinger is certainly entitled to legal defense against such charges, the issue in this case is whether such defense is a personal expense rather than a campaign expense. Nothing in the statutory language ever permits the Commission to find that defense against federal criminal charges is ever an ordinary or necessary campaign expense. The Commission has the ability and the duty, based on the language of 2 U.S.C. § 439a (b), not just to acknowledge that it does not sanction such activity, but to determine that these charges arose irrespective of Mr. Treffinger's campaign.

Pursuant to 2 U.S.C. § 439a (b), the Commission must decide whether Mr. Treffinger's legal expenses "would exist irrespective of a candidate's campaign or duties as a Federal officeholder." 11 C.F.R. § 113.1(g). The "irrespective test" can and should be applied to

determine whether the acts alleged in the Indictment would require legal defense irrespective of the campaign, rather than whether the underlying acts would have occurred irrespective of the campaign. This is the only sound application of the irrespective test, because the Commission can conclusively determine the basis of a criminal charge and whether the charge occurred as a result of campaign activity. In contrast, the Commission can only speculate about what motivated a candidate to commit an action, whether that motive was primary or secondary, and whether the wrongdoing ultimately would have taken place regardless of the candidacy. In this case, regardless of whether Mr. Treffinger's wrongdoing occurred because of the campaign, the legal defense of that wrongdoing was not necessitated by the campaign or obligations that arose because of the campaign, but occurred because the acts themselves were criminal violations of Mr. Treffinger's obligations as County Executive and because he attempted to conceal those crimes.

With respect to eleven Counts of the Indictment, the Commission correctly concludes that the criminal charges arose due to Mr. Treffinger's alleged abuse of his local office. Specifically, Mr. Treffinger is charged in Counts 1 through 3, 5, and 6 with using his position as Essex County Executive to extort money from County contractors. Counts 7 through 11 charge Mr. Treffinger with several acts of obstruction of the investigation into this extortion. Count 19 charges Mr. Treffinger with embezzling County funds to pay his hairdresser. The Opinion correctly determines that although certain of these acts took place during Mr. Treffinger's campaign and that Mr. Treffinger directed the proceeds of certain of the acts into his campaign accounts, the criminal charges arose irrespective of Mr. Treffinger's campaign. Instead, the charges arose because he abused his duties as Essex County Executive both in extorting the funds and in covering up his actions. Furthermore, the charges were brought not by a political adversary or a government agency with oversight arising from his campaign, but by federal prosecutors charged with enforcing all federal laws on behalf of the United States. Therefore, Mr. Treffinger would have been charged with this wrongdoing irrespective of his campaign obligations.

For the same reasons, Counts 12 through 14 should be designated as unrelated to Mr. Treffinger's campaign. These Counts charge Mr. Treffinger with "depriving the County of Essex and its citizens of two individuals' honest employ" by placing them on the County payroll while assigning them exclusively to campaign work. As a candidate for federal office, Mr. Treffinger would not have had the authority to place the two individuals on the County payroll; he could only commit this act as County Executive. Likewise, as with the charges of extortion and fraud, this misappropriation of County funds was not merely a fund raising violation, whereby funds were obtained in excess of campaign finance laws, nor was it simply a reporting violation relating to campaign staffing. Instead, it constituted a violation of federal criminal law and of Mr. Treffinger's position of trust as County Executive. The fact that Mr. Treffinger's campaign benefitted by this criminal act does not render the act campaign-related. As we noted in our last submission to the Commission, using proceeds of extortion in a campaign does not make the extortion "fund raising", any more than it would make bank robbery "fund raising" if the proceeds from the robbery were subsequently funneled into a campaign. Therefore, if the only connection between campaign and criminal activity is the use of proceeds from the criminal

activity in a campaign, this is an insufficient nexus to allow payment of legal fees.

Count 4 and Counts 15 through 18, which involve reporting violations to the Commission, are the result of a larger effort by Mr. Treffinger to cover up his criminal wrongdoing, and Counts 15 through 18 would be illegal regardless of their association with campaign activity. See 18 U.S.C. § 1001. Although, the actual wrongdoing charged in these Counts bears some relationship to Mr. Treffinger's campaign reporting requirements, criminal activity never constitutes campaign activity.<sup>1</sup> The mere fact that Mr. Treffinger was under federal reporting obligation does not turn his fraud and cover up of his crimes into campaign activity. We recognize however, that if the Commission is inclined to define campaign-related activity broadly, it would include charges such as these, as distinct from any crimes committed in course of the campaign. Criminal FECA violations, like those charged in Count 20, also fall within this category.

The Commission has noted the administrative difficulties of requiring payment of legal fees according to defense of various counts of an indictment. Nevertheless, to the extent possible Mr. Treffinger's counsel should be required to distinguish its billing as to various Counts of the Indictment, as it would have had to with respect to Count 19 pursuant to its original request. Furthermore, while the Commission's opinion is only binding in very limited circumstances, the Commission may note that attorneys representing candidates or office holders in future criminal actions would be well advised to maintain such distinctions in their billing records should they anticipate seeking reimbursement for legal expenses from campaign funds.

Finally, the Commission should require that Mr. Treffinger reserve any payment of his legal expenses from his surplus campaign funds (less restitution and any other required refund) until after he is sentenced. His sentencing is currently scheduled for September 10, 2003. At that time, the District Court will determine the final amount of restitution and fines owed by Mr. Treffinger. As noted in the U.S. Attorney's previous submission, pursuant to 18 U.S.C. § 371 and 18 U.S.C. § 1341, Mr. Treffinger may be subject to up to \$250,000 in fines based on the two violations to which he has pled guilty. Certainly, if the Commission determines that Count 14 is campaign-related, then any fines arising from that Count should also be campaign-related and payable from his campaign funds prior to payment of his legal fees from those funds.

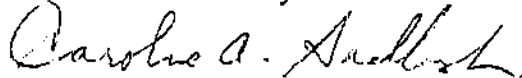
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<sup>1</sup>As we noted in our comment on the first Opinion, the best policy would be to disallow any expenditures from campaign funds for criminal defense: "[T]he foundation of any criminal charge is that an individual is not engaged in campaign activity but in illegal activity. Attempting to characterize criminal activity as motivated by a campaign or in furtherance of a campaign does not make it campaign activity. Although Mr. Treffinger's actions vividly illustrate this principle, it would be true regardless of the particular criminal charges alleged. Candidates should never expect to provide for their criminal legal defense by alleging that they acted in furtherance of their political campaigns." See U.S. Attorney's Comment, July 9, 2003.

In conclusion, we strongly urge that the Commission issue the first Draft Advisory Opinion, finding that Mr. Treffinger's criminal acts were, as a whole, unrelated to his campaign, and their defense is his personal expense. If the Commission is unwilling to reach this conclusion, it should endorse the underlying reasoning of the second Draft Advisory Opinion and find that Mr. Treffinger must pay for his legal expenses in defense of Counts 1 through 3, 5 through 14, and 19 from personal funds. Furthermore, any use of campaign funds for Mr. Treffinger's legal defense should be deferred until after any campaign refunds have been issued and after sentencing, when the final amount of restitution had been established and any fines have been imposed and paid.

Very truly yours,

CHRISTOPHER J. CHRISTIE  
United States Attorney



By: CAROLINE A. SADLOWSKI  
Assistant U.S. Attorney

Of Counsel: CRAIG C. DONSANTO  
Director, Election Crimes Branch  
Public Integrity Section  
Criminal Division

cc: Karin Kiecker, Esq.